

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the **Board** of Immigration Appeals

Falls Church, Virginia 2204 1

File:

Date:

In re:

MAY - 8 2001

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John C. Keller, Esquire

ON BEHALF OF SERVICE: Daniel J. Pomschloegl
Assistant District Counsel

CHARGE:

Notice: Sec. **237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -**
Convicted of aggravated felony

APPLICATION: Relief under the Convention Against Torture

The respondent, a native and citizen of Somalia, appealed from the Immigration Judge's decision finding him removable and denying his application for protection under the Convention Against Torture. The respondent's request for a waiver of the appeal fee is granted. The appeal will be dismissed.

The respondent was admitted to this country on or about September **12, 1995**, as an immigrant. In 1999, he was convicted in Minnesota on two counts of the offense of Criminal Vehicular Operation in violation of section 609.21, subd. 1(4) of the Minnesota State Statutes. He was sentenced to a **48-month** term of imprisonment for each offense, to run consecutively, for a total of 96 months.

The respondent contested removability based on his assertion that he had not been convicted of a crime of violence because the Minnesota statute under which he was convicted did not require **intent**. He also asserted that the Immigration Judge erred in failing to grant him relief under the Convention Against Torture.

Section 609.2 1, subd. 1(4) of the Minnesota State Statutes provides:

A person is guilty of criminal vehicular homicide resulting in death and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both, if the person causes the death of a human being not constituting murder or manslaughter as a result of operating a motor vehicle:
... (4) while having an alcohol **concentration** of 0.10 or more, as measured within two hours of the time of driving.

The respondent's conviction was a felony. At issue, then is whether it is a crime of violence as defined by 18 U.S.C. § 16(b), which requires that the offense be a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This Board employs a categorical approach in determining whether an offense is a crime of violence under section 18 U.S.C. § 16(b). Thus, there is no requirement that the defendant have a specific intent to commit the **crime**. *Matter of Puente*, Interim Decision 3412, 6 (BIA 1999). The focus is simply whether the generic nature or character of the offense is such that there is a substantial risk of the use of force.

The Eighth Circuit, in 'which this case arises, has not specifically determined whether a conviction under this particular statute is a crime of violence. The Eighth Circuit does, however, follow the categorical approach in determining whether a particular crime is a crime of violence. See *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (an involuntary manslaughter conviction, which "is a crime which, by definition, always results in the unlawful death of another human being," is a crime of violence). The court has stated, "[i]t matters not one whit whether the risk ultimately causes actual harm. [The] scrutiny ends upon a finding that the risk of violence is present," *Id.* at 981, quoting *United States v. Rodriguez*, 979 F.2d 138 (9th Cir. 1992). *Cf. United States v. Leeper*, 964 F.2d 75 1,753 (8th Cir. 1992) (crimes of violence for purposes of section 4B1.2 of the Sentencing Guidelines are not limited to intentional acts) with *United States v. Chapa-Garza*, 2001 WL 209468 (5th Cir. 2001) (concluding that the definition of a crime of violence under 18 U.S.C. § 16(b) requires the substantial likelihood that *intentional force* against the person or property of another would be used to commit the offense) and *Tapia Garcia v. INS*, 237 F.3d 12.16 (10th Cir. 2001) (finding that the danger inherent in drunk driving supports a conclusion that a **DUI** offense is a crime of violence under 18 U.S.C. § 16(b)).

In this case, the crime itself requires the operation of a motor vehicle while under the influence of an intoxicant. **A conviction Cur this offense also requires that the defendant cause death to his** victim by such operation. As such, the offense "by its nature" carries a substantial risk that physical force against the person or property of another could be used in the commission of the offense. It could not be committed absent the intoxicated use of a vehicle to kill another. **It is** therefore a crime of violence. *Matter of Puente, supra*. The respondent is removable as charged.

The respondent also has not established eligibility for relief under the Convention Against Torture. Although he claimed that he may be killed by the relatives or supporters of the people he killed during his drunk driving accident, we do not find this speculative fear to **qualify** under the Convention Against Torture. The respondent has not established "that it is more likely than not" that he would be tortured if removed to Somalia. 8 C.F.R. § 208.16(c)(2) (2001); *Matter of S-V*, Interim Decision 3430 (BIA 2000) (**torture must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity**). See *also* 8 C.F.R. § 208.16(c)(3)(i)-(iv) (2001). The respondent's attacks on the practicality of removal to Somalia and on the exercise of prosecutorial discretion by the Immigration and Naturalization Service also provide no basis for reversing the Immigration Judge's decision.

ORDER: The appeal is dismissed.



FOR THE BOARD